

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

JAMES W. LEWIS, JR.,

Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,

Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE
SECRETARY OF VETERANS AFFAIRS**

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Appellant appeals the April 29, 2015, decision of the Board that denied entitlement to: (1) an increased compensable disability evaluation for status post

stab wound, right posterior chest with traumatic pneumothorax; (2) an increased compensable disability evaluation for status post stab wound, right lower abdomen with traumatic perforated intestine; and (3) an increased compensable disability evaluation for status post stab wound, right lower leg. (Record (R.) at 2-12).

The BVA remanded Appellant's claim for entitlement to an increased compensable evaluation for status post stab wound of the right index finger and that claim is not currently before this Court. (R. at 10-12 (2-12)); *Breeden v. Principi*, 17 Vet. App. 475, 478 (2004); see also 38 U.S.C. § 7266(a).

B. Background

Appellant served on active duty from August 1976 to August 1980. (R. at 565). In June 2010, Appellant submitted a statement to the Department of Veterans Affairs (VA) Regional Office (RO) requesting service connection for post traumatic stress disorder (PTSD). (R. at 187-88). A Report of Contact shows that RO personnel contacted Appellant and determined that Appellant also wanted to file an increased rating claim for residuals of his stab wound conditions. (R. at 184).

Appellant was provided a compensation examination in November 2010. (R. at 154-61). He was afforded another compensation examination in October 2012. (R. at 80-94).

In April 2011, the RO issued a rating decision denying Appellant's increased rating claims. (R. at 430-39). Appellant submitted a Notice of Disagreement (NOD) in July 2011, (R. at 113-15), and the RO issued a Statement of the Case (SOC) in January 2013. (R. at 51-60). Appellant filed a substantive appeal in February 2013. (R. at 38-39).

In April 2015, the Board denied Appellant's claims for entitlement to: (1) an increased compensable disability evaluation for status post stab wound, right posterior chest with traumatic pneumothorax; (2) an increased compensable disability evaluation for status post stab wound, right lower abdomen with traumatic perforated intestine; and (3) an increased compensable disability evaluation for status post stab wound, right lower leg. service connection for a right foot disability. (R. at 2-12). This appeal followed.

III. ARGUMENT

The Court should affirm the decision on appeal. Appellant does not demonstrate the BVA committed any error that would warrant remand or reversal.

Appellant argues that the Board relied on inadequate examinations and provided inadequate reasons and bases because neither the Board nor the November 2010 or October 2012 VA compensation reports addressed whether there is possible underlying muscle damage or residual muscle injuries with regard to Appellant's status post stab wound claims. (Appellant's Brief (App. Br.) at 3-8). However, Appellant fails to carry his burden of demonstrating that

the VA examination reports are inadequate for rating purposes or that the Board failed to provide adequate reasons or bases.

In order to be accepted as adequate by the Board, a medical opinion must support its conclusion with an analysis that the Board can consider and weigh against contrary opinions. *Nieves-Rodriguez v. Peake*, 22 Vet.App. 295, 301 (2008); *Steffl v. Nicholson*, 21 Vet.App. 120, 124-25 (2007). It must be based upon consideration of the Veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one. *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008).

Appellant cites medical records during his 1979 injury which show that he had partial muscle severance in the right lower leg, (R. at 360), and that the leg wound went into the anterior tibial muscles in two places. (App. Br. at 6); (R. at 370 (368-70)). However, none of the current medical records show that Appellant has complained of or has been treated for muscle damage as part of his post stab wound residuals and there was no duty to provide an examination addressing issues that were not reasonably raised by the record. *McLendon v. Nicholson*, 20 Vet.App. 79, 81 (2006).

Appellant was provided VA compensation examinations in November 2010 and October 2012. (R. at 154-61, 80-94.) During the November 2010 VA examination, Appellant's scars were noted as not painful, no signs of skin

breakdown, superficial and there were no other disabling effects. (R. at 154-61). The October 2012 VA examination report also noted that Appellant's scars were not painful, stable, and there was no elevation, depression, adherence to the underlying tissue or missing underlying soft tissue. (R. at 82, 91 (80-94)). The examiner was also asked to note any other pertinent physical findings, complications, signs and/or symptoms (such as muscle or nerve damage) associated with any scar (regardless of location or disfigurement of the head, face, or neck) and the examiner noted that Appellant's scars were well-healed and non-tender. (R. at 93-94 (80-94)). Appellant fails to demonstrate that the VA medical examinations are inadequate and that the Board was clearly erroneous in relying on it. *Hood v. Shinseki*, 23 Vet.App. 295, 299 (2009); *D'Aries*, 22 Vet.App. at 104 (whether a medical examination is adequate is a finding of fact); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990).

Appellant claims that the Board should have discussed whether Appellant's status post stab wound residuals caused muscle damage and that the BVA relied on inadequate examination because the compensation examinations provided did not address muscle damage or other residuals of muscle damage. (App. Br. at 5-7). However, as noted above, Appellant has never indicated that he currently suffers from a muscle injury and has not shown otherwise. Even though the initial 1979 injury showed that Appellant had partial muscle severance and that the leg wound went into his anterior tibial muscles in the right lower leg, (R. at 360, 370

(368-70)), there is no medical or lay evidence that Appellant currently has a muscle-related injury to his right posterior chest, right lower abdomen, or right lower leg. As the Board noted, Appellant has not made any complaints related to his status post stab wounds and VA records do not show any treatment for this condition. (R. at 8 (2-12)). The November 2010 VA examination also showed that Appellant's scars had no other disabling effects. (R. at 154-61) The October 2012 VA examiner was also asked to note any other pertinent physical findings, complications, signs and/or symptoms such as muscle or nerve damage associated with any scar, and the examiner indicated that Appellant's scars were well-healed and non-tender. (R. at 93-94 (80-94)). There was no duty for the BVA to discuss or provide an examination with regard to muscle damage or other muscle residuals in this case and the Court should affirm the decision on appeal.

The Secretary does not concede any material issue that the Court may deem Appellant adequately raised, argued and properly preserved, but which the Secretary may not have addressed through inadvertence, and reserves the right to address same if the Court deems it necessary or advisable for its decision. The Secretary also requests that the Court take due account of the rule of prejudicial error wherever applicable in this case. 38 U.S.C. § 7261(b)(2).

CONCLUSION

For the foregoing reasons, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully requests this Court to affirm the decision on appeal.

Respectfully submitted,

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